NO. 10-387

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

MIGUEL VACA,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

Because Petitioner has failed to include a number of relevant and probative facts which establish that trial counsel's failure to consider using mental health evidence in mitigation of punishment was unreasonable and prejudicial, and because Petitioner has distorted what the Missouri Supreme Court actually decided, Respondent presents his own statement of relevant facts.

I. Relevant Facts Surrounding the Trial and Direct Appeal

During October and November 2002, two robberies and an attempted robbery took place in the same vicinity in Kansas City. The suspect rode a bicycle and was seen fleeing toward two nearby apartment complexes. Respondent, Miguel Vaca, lived in one of the complexes. Physical evidence found in Mr. Vaca's apartment linked him to the offenses. The state charged Mr. Vaca with two counts of first degree robbery, one count of attempted first degree robbery, three counts of armed criminal action, and one count of second degree assault.

Following his arrest, Mr. Vaca was taken to the Platte County Jail, where personnel immediately recognized that he was mentally ill, and a psychiatrist prescribed anti-psychotic medications. From the beginning of their attorney-client relationship, Mr. Vaca's trial attorney, Anthony Cardarella, had concerns about Mr. Vaca's mental health.

Mr. Cardarella retained Dr. Bill Geis, Ph.D, a licensed clinical and forensic psychologist, to evaluate Mr. Vaca's competency to proceed to trial and to

determine whether Mr. Vaca had a mental disease or defect that could have impacted the commission of the alleged crimes. Dr. Geis conducted the evaluation and provided Mr. Cardarella with a report detailing his findings. Mr. Cardarella read the report and was aware of the information it contained.

Mr. Vaca's trial was one of the first times that Mr. Cardarella represented a client in a bifurcated, non-capital trial under Section 557.036, RSMo Supp. 2008.[1] Under that statute, the jury first decides the issue of guilt or innocence; if there is a guilty verdict, the case proceeds to a sentencing phase. Mr. Cardarella believed there was a strong likelihood that Mr. Vaca would be convicted and that a sentencing phase would be necessary. Mr. Cardarella planned to call family members who could testify and draw sympathy for Mr. Vaca. Mr. Cardarella did not consider calling Dr. Geis to testify at the sentencing phase and had no strategic reason for not calling Dr. Geis as a witness in the punishment phase.

At trial, Mr. Vaca testified as part of the defense case-in-chief and denied any involvement in the charged offenses. Mr. Vaca was 43 at the time of the alleged crimes. Mr. Vaca had suffered a head injury in a bicycle accident when he was 28 or 29. Mr. Vaca told the jury that he received a Social Security disability pension because he was paralyzed in the left neck and arm and had a weak right

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[1] This statute is set out in full in the Appendix.

knee. Mr. Vaca added that he had headaches and was nervous and took some medications for a "mental disorder."

Mr. Vaca's brother, Albert Vaca, testified as a defense witness in the first phase of trial that in 1988 Mr. Vaca suffered an injury which required brain surgery. After that, Mr. Vaca sometimes seemed to be nervous. Mr. Vaca's sister, Rita Vaca, testified in the first phase that Mr. Vaca had lived with her and was "on disability".

During the deliberations on the issue of guilt or innocence, the jury asked the following questions:

1) Where has Miguel been since arrested 11-2002[?]
2) Was Miguel given psychological testing[?]
3) Had he been compliant with medications before arrest[?]
4) Is he currently on meds [?]

The trial court did not answer the jury's questions. The jury convicted Mr. Vaca of all counts charged.

The sentencing phase began shortly after the jury returned the guilty verdicts. The state called five of the complaining witnesses to testify. Mr. Vaca's father was the only defense witness during the sentencing phase; he testified that Mr. Vaca had no prior felony or misdemeanor convictions and that he and his wife had only visited Mr. Vaca two times during the 45 months he was incarcerated awaiting trial.

The jury declared punishment at thirty years in prison for each of Count I, first degree robbery and Count VI, armed criminal action; life in prison for Count III, first degree robbery; ten years in prison for each of Counts II and IV, armed criminal action; fifteen years in prison for Count V, attempted first degree robbery; and seven years in prison for Count VII, assault in the second degree. The trial court sentenced Mr. Vaca to the terms recommended by the jury and ordered that the sentences run consecutively for a total of life plus 102 years in prison.

On direct appeal, the Missouri Court of Appeals, Western District, affirmed Mr. Vaca's convictions and sentences. *State v. Vaca*, 204 S.W.3d 754 (Mo. App. W.D. 2006).

II. The Postconviction Case

Mr. Vaca pursued postconviction relief on the ground that his attorney should have presented readily available evidence - of which his attorney was well-aware - of his severe mental illness, as mitigation during the sentencing phase of trial.

Mr. Vaca has a long history of schizophrenia and borderline intellectual functioning. His mental illness has prevented him from living independently or holding a full-time job. Following his arrest, he was taken to the Platte County Jail, where personnel immediately recognized that he was mentally ill and a psychiatrist evaluated Mr. Vaca and prescribed anti-psychotic medications. As

noted above, Mr. Vaca's trial attorney, Anthony Cardarella, had concerns from the outset that Mr. Vaca had mental health problems.

Before trial, Dr. Bill Geis, Ph.D., evaluated Mr. Vaca at the request of defense counsel. Dr. Geis was not called to testify at either phase of the trial. At the postconviction evidentiary hearing, Dr. Geis provided expert testimony about Mr. Vaca's mental illness. Specifically, following testing and record review, Dr. Geis diagnosed Mr. Vaca as having paranoid schizophrenia, dysthymia, post-traumatic stress disorder, and borderline intellectual functioning. On the Global Assessment of Functioning Scale, Mr. Vaca received a score of 40 on a 100-point scale, indicating limited functioning. Dr. Geis gave his opinion, to a reasonable degree of professional certainty, that Mr. Vaca suffered from these mental diseases and defects at the time of the offenses, from October through November 2002.

Regarding whether Mr. Vaca has a mental disease or defect that could have impacted the commission of the alleged crimes, Dr. Geis reported:

> The defendant has a serious mental disease – schizophrenia – that clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense. The condition of schizophrenia is corroborated by other medical personnel and appears to have been in existence for most of his life. He also has a condition of low intelligence (borderline intellectual functioning) that could have impacted his ability to understand the impact of his actions.

Dr. Geis could not recall Mr. Cardarella asking him to testify during the sentencing phase of Mr. Vaca's trial, but he was available and willing to testify, if he had been asked to do so.

As part of his evaluation, Dr. Geis reviewed Mr. Vaca's social history and found that individuals on both sides of Mr. Vaca's family have been diagnosed with paranoid schizophrenia. As an adult, Mr. Vaca was only able to care for himself in the most minimal way. He lived at home with his parents until he was 36 years old, had an episodic work history at menial jobs, and lived in Arizona with his brother from 1996 to 2001. He lived with his sister in Kansas City from 2001 until he was charged in the criminal case and never dated or had a girlfriend.

During an early grade at one school, Mr. Vaca poked another student with a pencil seriously enough that the school "really freaked out." Mr. Vaca was immediately removed from the school and saw his first psychiatrist after that incident. Mr. Vaca described himself as a nervous child who never felt comfortable with other children.

In 1989, at age 27, Mr. Vaca had a bicycle accident and suffered a head injury that resulted in a hematoma (blood clot) forming in his brain. Mr. Vaca underwent surgical draining to relieve pressure on the brain. This information was verified through the records of Dr. Martin Rhodes, which Mr. Cardarella had provided to Dr. Geis. Dr. Rhodes's records included a notation from December 2001 that Mr. Vaca had been diagnosed with schizophrenia while he was in

Arizona, and that he was taking Trazodone (an anti-depressant sleep medication) and Klonopin (an anti-anxiety medication). Dr. Rhodes noted that Mr. Vaca was on disability for his psychiatric problems, that Mr. Vaca did not leave his house very often, and that Mr. Vaca had "problems with routine mental function."

On March 20, 2002, Dr. Rhodes noted that Mr. Vaca appeared "depressed with what may be some delusions concerning the effects of lab drawing." On June 21, 2002, Mr. Vaca's paranoid schizophrenia appeared "worse than last visit." Mr. Vaca appeared agitated and anxious and had "looseness of association." Dr. Rhodes encouraged Mr. Vaca to see a psychiatrist.

From his mental status examination, Dr. Geis observed that Mr. Vaca appeared depressed and subdued and had trouble thinking. Mr. Vaca reported that when he first arrived at the jail, he thought he was having a "mental breakdown." Mr. Vaca told the psychiatrist at the jail that he was "seeing things and seeing people burning." Mr. Vaca reported having experiences from the past of being "slapped and beaten and whipped." Mr. Vaca reported having frequent nightmares and daytime flashbacks of bad events from the past.

Mr. Vaca reported symptoms of poor sleep, crying jags, dejection, demoralization, interpersonal withdrawal, fatigue, low motivation, and reduced pleasure. Mr. Vaca reported hearing voices and said that the voices had gotten worse since the head injury in 1989. Sometimes the voices would scream, causing him to feel agitated and terrorized.

At the time of the offenses, Mr. Vaca "did not know exactly what was going on" in his mind. He was not taking his medication, because he was having trouble with his insurance. Mr. Vaca was having "visions of people burning in fire, yelling and screaming, trying to pull me in" and recalled hearing voices that said, "go out, go out, go out," but he did not know what the voices meant. Mr. Vaca told Dr. Geis that he had no motivation for robbery, was not angry at people, and did not want to hurt anyone. Mr. Vaca said that his family and other people have told him that he is crazy.

On the Wechsler Adult Intelligence Scale – Revised (WAIS-R), Dr. Geis found that Mr. Vaca's Verbal IQ is 76, his Performance IQ is 72, and his Full Scale IQ is 73. The subtests for the verbal and performance scales indicated that Mr. Vaca has always operated at a lower range of intellectual functioning, consistent with other low-functioning, non-mentally retarded individuals.

Postconviction counsel provided additional records to Dr. Geis in anticipation of his testimony at the postconviction hearing. Mr. Vaca's school records showed poor performance in school, which Dr. Geis found to be consistent with Mr. Vaca's intellectual functioning assessments. Mr. Vaca attended special education classes and dropped out of school in ninth grade. Mr. Vaca's Social Security records showed that Mr. Vaca was approved to receive Social Security disability benefits after he was found to have a Verbal IQ of 69, a Performance IQ

of 65, and a Full Scale IQ of 65. These results place Mr. Vaca in the range of mental retardation and are consistent with Dr. Geis's results.

Dr. Rajiv Parikh treated Mr. Vaca from December 2000 to early 2001. Dr. Parikh noted that Mr. Vaca was extremely paranoid and suffered severe anxiety and depression. Dr. Parikh named Mr. Vaca's condition as a schizoaffective disorder, *i.e.*, schizophrenia with a depressive condition, a diagnosis functionally identical to Dr. Geis's diagnosis.

Mr. Vaca saw Dr. Susan Laningham on October 18, 2002, three days before the first charged offense. Dr. Laningham noted that Mr. Vaca reported "feeling out of control" and that he felt that he needed to start taking Klonopin again. Dr. Laningham was uncertain whether Mr. Vaca's diagnosis was schizophrenia or bipolar disorder, but she wanted him to see a psychiatrist as soon as possible. Mr. Vaca had an appointment scheduled with a psychiatrist, but it was still a few weeks away.

Dr. Geis found it significant that the jail psychiatrist put Mr. Vaca on anti-psychotic medications immediately after Mr. Vaca arrived at the Platte County Jail. This indicated that Mr. Vaca was in a psychotic state when he entered the jail. While Mr. Vaca was at the jail, the staff mistakenly reduced his medications by 50%, causing difficulty sleeping and increased auditory hallucinations. Once the mistake was discovered and the medications were increased, Mr. Vaca's symptoms became more manageable.

Dr. Geis found that Mr. Vaca was not malingering but was in a psychotic state and had a mental disease or defect before he committed the crimes. Dr. Geis testified to a reasonable degree of psychological certainty that at the time of the offenses Mr. Vaca had a serious mental disease, schizophrenia, paranoid type, which impacted his ability to form rational thought and to conform his behavior to the requirements of the law. Mr. Vaca's borderline intellectual functioning also affected his ability to understand the impact of his actions.

At the postconviction hearing, trial counsel testified that he pursued a defense of misidentification, but that he also believed there was a strong likelihood that Mr. Vaca would be convicted and that a sentencing phase would be necessary. Mr. Cardarella planned to call family members who could testify and draw sympathy for Mr. Vaca. Mr. Cardarella did not consider calling Dr. Geis to testify during the sentencing phase. Mr. Cardarella had no strategic reason for not calling Dr. Geis to testify in the sentencing phase, and stated, "I honestly didn't give that a thought. . . . I didn't analyze it from that perspective at all."

The postconviction motion court denied Mr. Vaca's motion for postconviction relief . On appeal, the Missouri Supreme Court relied on *Strickland v. Washington*, 466 U.S. 668 (1984), to find that trial counsel's inaction in failing to even consider whether to present Dr. Geis's testimony as mitigation evidence fell below an objective standard of reasonableness and undermined confidence in the outcome of the sentencing phase. *Vaca v. State*, 314 S.W.3d

331, 335-337 (Mo. banc 2010); *Strickland*, 466 U.S. at 687-688. The Court found that counsel's failure to exercise any trial strategy or to even consider calling Dr. Geis to testify entitles Mr. Vaca to a new sentencing phase. *Id.*

REASONS THE WRIT SHOULD BE DENIED

I. The Missouri Supreme Court Did Not Create a New Category of Per Se Prejudice

Petitioner asserts that the Missouri Supreme Court has opened the door to an expansion of the *per se* prejudice rule created by *United States v. Cronic*, 466 U.S. 648 (1984), for application in limited circumstances. Petition at 8, 15-17. This is a fanciful interpretation of the Missouri Supreme Court's opinion. The state's petition is nothing more than a request for error correction, when no error occurred. In fact, the Missouri Supreme properly applied *Strickland v. Washington*, 466 U.S. 668 (1984), to the unique facts presented by Mr. Vaca's case.

As Petitioner concedes, the Missouri Supreme Court began its analysis of Mr. Vaca's claims by first setting forth this Court's two-part test for evaluating effectiveness of counsel under *Strickland*.[2] The Missouri Supreme Court noted, "To show that his counsel was ineffective, [Vaca] must demonstrate, first, that his counsel's representation 'fell below an objective standard of reasonableness."

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[2] *See*, Petition at 6.

Vaca, 314 S.W.3d at 335, *quoting Edwards v. State,* 200 S.W.3d 500, 518 (Mo. banc 2006), *and Strickland,* 466 U.S. at 687-688. The Missouri Supreme Court also held that "there must be a showing of 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' which is a probability 'sufficient to undermine confidence in the outcome.'" *Vaca,* 314 S.W.3d at 335, *quoting, Edwards,* 200 S.W.3d at 518; *Strickland,* 466 U.S. at 694.

The Missouri Supreme Court relied on its opinion in *Hutchison v. State,* 150 S.W.3d 292, 304 (Mo. banc 2004), *cert. denied* 546 U.S. 837 (2005), for the elements necessary to show ineffective assistance of counsel for failure to call a witness to testify at trial. *Vaca,* 314 S.W.3d at 335-336. Ineffectiveness may be found when a movant can prove that 1) trial counsel knew or should have known of the existence of the witness, 2) the witness could have been located through reasonable investigation, 3) the witness would have testified, and 4) the witness's testimony would have produced a viable defense. *Id., quoting Hutchison,* 150 S.W.3d at 304. The Court noted that the state conceded the first three requirements, in that Dr. Geis was known to defense counsel and was available and willing to testify. *Vaca,* 314 S.W.3d at 336. The Court held that submission of the mental health history, subject to counsel's strategic judgment, is a viable defense during a bifurcated sentencing phase. *Id., citing, Glass v. State,* 227

S.W.3d 463 (Mo. banc 2007), *cert. denied,* 543 U.S. 1058 (2005). *See also, e.g., Rompilla v. Beard,* 545 U.S. 374 (2005).

The Missouri Supreme Court noted that where counsel has investigated possible strategies, the selection of witnesses and evidence are matters of trial strategy and are virtually unchallengeable in an ineffective assistance claim. *Vaca,* 314 S.W.3d at 336, *quoting, Williams v. State,* 168 S.W.3d 433, 443 (Mo. banc 2005), *and Middleton v. State,* 103 S.W.3d 726, 736 (Mo. banc 2003). This is consistent with *Strickland's* admonition that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland,* 466 U.S. at 691.

The Missouri Supreme Court had the authority to decide whether trial counsel acted reasonably and whether Mr. Vaca was prejudiced. The Missouri Supreme Court found that counsel readily recognized that there were problems with Mr. Vaca's mental condition, that counsel believed that conviction was probable after a trial, and that counsel knew that strategy during the sentencing phase was vital to the representation of his client. *Vaca,* 314 S.W.3d at 336. Despite having ample evidence of the mental health issues, counsel gave no strategic consideration to calling Dr. Geis to testify. *Id.*

Based on these factual findings, the Missouri Supreme Court held that counsel's inaction in failing to strategically consider whether to call Dr. Geis to testify fell below an objective standard of reasonableness. *Id.* at 336. The Court

found that this omission, under the circumstances as they existed at trial, including the questions asked by the jury, undermined the Court's confidence in the sentencing phase's outcome. *Id.*

This case is merely a fact-specific application of *Strickland*. Petitioner's real complaint is that the Missouri Supreme Court reached an outcome with which Petitioner disagrees on these facts. The claim that the Missouri Supreme Court has created a new category of *per se* prejudice is an entirely fanciful notion. The Missouri Supreme Court did not cite *Cronic* anywhere in its opinion, nor did the Missouri Supreme Court rely on *Cronic* or substitute it for *Strickland*. *Vaca*, 314 S.W.3d at 332-337. The Missouri Supreme Court simply set out the *Strickland* standard for evaluating counsel's performance, and then straightforwardly applied both parts, performance and prejudice, to the facts of Mr. Vaca's case. *Vaca*, 314 S.W.3d at 335-337. Missouri uses the same *Strickland* standard expected of any other court considering a claim of ineffective assistance of counsel for failure to call a witness.

The Missouri Supreme Court's opinion specifically stated and applied *Strickland's* articulation of prejudice, which requires no more than a reasonable probability of a different result "sufficient to undermine confidence in the outcome." *Vaca*, 314 S.W.3d at 335-337; *Strickland*, 466 U.S. at 694. Inherent in the Missouri Supreme Court's discussion is the finding that a reasonable probability exists that counsel would have presented the mental health evidence, if

he had considered the possibility of using it in sentencing, and that such evidence would have affected the sentences recommended by the jury. *Vaca,* 314 S.W.3d at 335-336. That the Missouri Supreme Court did not state this finding as explicitly as Petitioner might like does not change the standard used to evaluate counsel's effectiveness. Petitioner starkly misrepresents the Missouri Supreme Court's opinion when Petitioner accuses the Missouri Supreme Court of creating a category of presumptive error.

To the extent that the Missouri Supreme Court based its analysis on rulings in prior capital appeals, *e.g., Hutchison,* 150 S.W.3d at 304, such reference was required because there are very few Missouri cases, even now, that address the bifurcated non-capital sentencing scheme set out in Section 557.036, RSMo Supp. 2008. Under that statute, evidence may be presented during the penalty phase to either support or mitigate a defendant's punishment. Section 557.036.3; *State v. Edwards,* 173 S.W.3d 384, 386 (Mo. App. E.D. 2005). That evidence may include, within the discretion of the court, evidence concerning the impact of the crime on the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Section 557.036.3. "The purpose of having a separate penalty phase in non-capital trials . . . is to permit a broader range of evidence relevant to the appropriate punishment to be imposed." *State v. Prosser,* 186 S.W.3d 330, 333 (Mo. App. E.D. 2005). Effective advocacy is critical under this individualized non-capital sentencing

scheme. The Missouri Supreme Court used *Hutchison* to set out the elements that a movant must prove to establish that counsel was ineffective for failing to call a certain witness to testify in the penalty phase, *Vaca*, 314 S.W.3d at 335-337, but the Court did not impose the heightened duty of investigation required of counsel in a capital proceeding. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976).

The Missouri Supreme Court also has not created a lower threshold of prejudice for non-capital cases. *See*, Petition at 24-26. The standard remains: A movant must prove a reasonable probability of a different result "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Missouri Supreme Court held that counsel cannot make a tactical decision without the requisite prior investigation and consideration of mitigation options. *Vaca*, 314 S.W.3d at 336-337. This is consistent with this Court's opinion in *Sears v. Upton*, 130 S.Ct. 3259, 3265-3266 (2010), where this Court reaffirmed the requirement that counsel conduct a constitutionally effective mitigation investigation. This Court held that a tactical decision "is a precursor to concluding that counsel has developed a 'reasonable' mitigation theory in a particular case." *Sears*, 130 S.Ct. at 3265. To assess the probability of a different outcome, courts must consider the totality of the available mitigation evidence – both that adduced at trial and later adduced in postconviction or habeas proceedings, and reweigh it against the evidence in aggravation. *Id.* at 3266, *quoting, Porter v. McCollum*, 130 S.Ct. 447, 453-454 (2009)*(per curiam)*. There is no conflict between the

standard this Court set out in *Sears* and the opinion of the Missouri Supreme Court in *Vaca*. Both *Sears* and *Vaca* are firmly rooted in the *Strickland* prejudice standard. *Sears*, 130 S.Ct. at 3265-3267; *Vaca*, 314 S.W.3d at 335-337.

Petitioner presents a strawman by accusing the Missouri Supreme Court of relying on the idiosyncracies of the particular decision-maker. Petition at 22. In so doing, the state misapplies the relevant discussion in *Strickland*, which states:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

466 U.S. at 694-695. Here, *Strickland* holds that the jury is presumed to have followed the instructions given by the trial court and to have reasonably, conscientiously, and impartially applied the standards that govern the jury's

decision, unless there is some evidence to impeach the process. There is no evidence that would impeach the process followed by the jury in Mr. Vaca's case.

Additionally, where "the actual process of decision" is "part of the record of the proceeding under review," then evidence about the actual decision-making process may be considered in the determination of prejudice. *Id.* A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Id.* at 695. The jurors' inquiries about Mr. Vaca's mental health are not idiosyncratic because they were based on the evidence adduced at Mr. Vaca's trial. To whatever extent the jurors' questions come within that term as used in *Strickland*, Justice O'Connor's opinion expressly exempts the irrelevance of a decision-maker's "idiosyncracies" when they are a matter of record. 466 U.S. at 695. Thus, the Missouri Supreme Court properly took into account the four questions asked by the jury in finding that confidence in the outcome of the sentencing phase was undermined. *Vaca*, 314 S.W.3d at 336-337.

In this case, the jury heard all of the evidence, including Mr. Vaca's own testimony in the first phase of the trial, and determined on its own that Mr. Vaca has some type of mental health problems. Because the question of mental disease or defect was not presented as a defense, the trial court properly could not answer the jury's questions about Mr. Vaca's mental health. Nevertheless, the jury's questions should have served as notice to trial counsel that at least some of the jurors would consider Mr. Vaca's mental health issues as evidence in mitigation of

punishment. Reasonably competent counsel would have considered before trial whether Dr. Geis's testimony would be helpful mitigation evidence in the sentencing phase, but in the absence of such pretrial analysis, the jury's questions should have alerted counsel to that prospect.

Strickland requires the postconviction court to assess trial counsel's conduct in light of the facts and circumstances as they existed *at trial*. 466 U.S. at 690, 694-696. The Missouri Supreme Court would have violated *Strickland* if the Court had failed to consider or address the record showing that the guilt phase evidence raised questions about Mr. Vaca's mental health. The jury's questions relate both to the Court's analysis of counsel's performance under the circumstances as they existed at trial, and to the analysis of prejudice, *i.e.*, the likelihood of a different result. *Strickland*, 466 U.S. at 690, 695-696.

Petitioner has argued that this Court should grant certiorari because the Missouri Supreme Court's decision "would eviscerate the prejudice requirement" for claims of ineffective assistance of counsel in non-capital sentencing proceedings and "would permit sentences to be set aside on little more than speculation." Petition at 25-26. This argument grossly misstates the Missouri Supreme Court's decision. Under *Vaca*, the prejudice requirement is alive and well. The *Vaca* opinion is based on well-documented evidence of mental illness and the lack of any strategic consideration or decision by trial counsel about whether to present such evidence in mitigation. The Missouri Supreme Court

specifically found that counsel's inaction undermined confidence in the outcome, *i.e.*, that Mr. Vaca was prejudiced by his attorney's failure to strategically consider whether to use Dr. Geis's testimony in mitigation. *Vaca*, 314 S.W. 3d at 336.

Petitioner's concern about "speculation" is unfounded. Applying the *Strickland* standard necessarily requires a reviewing court to "speculate" about the effect of new mitigating evidence, regardless of how much or how little mitigation evidence was presented during the initial penalty phase. *Sears v. Upton*, 130 S.Ct. 3259, 3266-3267. *Strickland* requires the reviewing court to take into account the newly uncovered mitigation evidence, along with the evidence already introduced, to determine whether a *reasonable probability* exists of a different sentence after a constitutionally sufficient investigation. *Sears*, 130 S.Ct. at 3267. The reviewing court is not required to determine that a different result would be *certain* to occur.

The Missouri Supreme Court's opinion only imposed on counsel the duty to examine and consider the potential mitigating evidence available to counsel and to make a strategic decision whether or not to use that evidence in the sentencing phase of a non-capital trial. *Vaca*, 314 S.W.3d at 335-337. In *Strickland*, this Court declined to list a particular set of detailed rules for counsel's conduct, because any such set of rules "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." 466 U.S. at 688-689. Consistent with *Strickland*, the Missouri Supreme Court was careful not to interfere with trial counsel's flexibility

to make strategic decisions regarding the evidence available and the circumstances of his or her client's actual trial. *Vaca*, 314 S.W.3d at 335-337.

Strickland's recognition of the importance of counsel's independence and wide latitude in making tactical decisions also disposes of Petitioner's complaint that the Missouri Supreme Court did not require counsel at a resentencing hearing to present the mental health evidence that was not presented at the first trial. Petition at 17. Plainly, defense counsel at Mr. Vaca's first trial had available a wealth of evidence that could have been used in mitigation. Evidence of Mr. Vaca's mental illness would have gone far to explain Mr. Vaca's behavior in committing the offenses, even if counsel chose not to pursue a defense of not guilty by reason of mental disease or defect. The Missouri Supreme Court recognized the mitigating impact of this evidence and remanded precisely so that competent counsel could give that evidence the consideration that it deserves. *Vaca*, 314 S.W.3d at 336-337. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 288 (2004) ("Evidence of significantly impaired intellectual functioning" is evidence that might serve to mitigate punishment). The Missouri Supreme Court properly deferred to counsel to review the mental health evidence in the context of the case and to make the ultimate strategic decision about whether to present that evidence in the new sentencing hearing.

Petitioner's unfounded accusation that Missouri courts have declared a class of *Cronic* presumed prejudice cases gets no help from the state's

idiosyncratic anecdote about *Williams v. State*, 254 S.W.3d 70 (Mo. App. W.D. 2008).[3] That case involved an entirely different issue than this case. The question in *Williams* was whether trial counsel, a privately retained attorney, was ineffective for failing to prove his client's indigency in order to obtain funding needed to seek the opinion of an independent psychiatric expert. *Williams*, 254 S.W.3d at 73, 82-83. Williams's attorney fees had been paid by his father and he maintained that he had no additional resources to fund examinations or consultations with a psychiatrist. *Id.* at 73. The Missouri Court of Appeals, Western District, found that counsel failed to act as a reasonably competent attorney under *Strickland* when he did not follow the statutorily mandated procedures to prove that Williams was a poor person entitled to funding for expert assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Williams*, 254 S.W.3d at 82-83. The appellate court remanded for a new trial. *Id.* Petitioner asserts that upon retrial, Williams's new attorney chose not to present any evidence about Williams's mental state, after determining that such testimony would not be helpful.

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[3] *Williams* arose out of the same county as Mr. Vaca's case, and both Williams's trial and Mr. Vaca's trial were prosecuted by the same prosecutor's office.

Petitioner complains that the proceedings at Williams's second trial establish that there was no error in his first trial. Petition at 16-17. Petitioner's complaint assumes that trial counsel at the first trial would have chosen the same course as counsel at the second trial. What the state ignores is that counsel at the first trial did not have the benefit of an independent mental evaluation upon which to make that decision. *Williams*, 254 S.W.3d at 82-83. The prejudice to Williams arose from first trial counsel's lack of proper investigation, which was caused by a lack of funding that resulted from counsel's ineffective assistance. *Id.* Assuming, *arguendo*, that Williams's new trial duplicated his first trial, that result does not establish the state's claim that Missouri appellate courts have expanded *Cronic* presumptive prejudice. Certiorari to this Court in Mr. Vaca's case is not justified simply because the state does not like the individual outcome in an unrelated and dissimilar trial court disposition.

II. Petitioner Misrepresents the Applicability of Cases Involving the "Double-Edged Sword" Analysis of Mitigation Evidence

To support its attack on the Missouri Supreme Court's decision, Petitioner argues that the opinion "conflicts with how this Court and other courts have handled claims of failure to present evidence that has the potential to damage the defense case," asserting that "most courts have found no prejudice from the failure to present such 'double-edged evidence.'" Petition at 18. This argument ignores or minimizes the essential element of a strategic decision about whether to use

such evidence in sentencing. Simply put, the "double-edged sword" principle at play in the cases cited by the state has no application where, as in Mr. Vaca's case, defense counsel confirms that he made no strategic decision to forego the omitted evidence. Mr. Vaca's attorney specifically testified that he had no strategic reason for not presenting the mental health evidence, and that he did not even analyze Dr. Geis's testimony "from that perspective at all."

The Missouri Supreme Court's decision poses no conflict with either Missouri case law or rulings in other jurisdictions that have upheld strategic judgments of "double-edged" evidence, a scenario the Missouri Supreme Court expressly recognized. *Vaca*, 314 S.W.3d at 336-337. Further, Petitioner's tacit claim that these cases stand for a *per se* rule of "no prejudice" from the omission of mental health evidence violates the very principles of *Strickland* that preclude the type of "*per se* prejudice" Petitioner unjustly accuses the Missouri Supreme Court of promulgating.

Petitioner relies on *Wong v. Belmontes*, 130 S.Ct. 383, 386 (2009), to support its position that there can be no prejudice from the failure to present "double-edged" mitigation evidence. That is not what this Court held. In *Wong*, the petitioner's trial attorney prepared a carefully tailored mitigation case and called nine mitigating witnesses, without opening the door to extensive evidence that the defendant had been involved in a prior, execution-style murder, about which he had boasted to several people. *Id.* at 385-386. This Court found that on

the facts of that case, the petitioner could not establish prejudice from the failure to introduce additional mitigating evidence where that additional evidence would have opened the door to much more damaging aggravating evidence. *Id.* at 385-386. Far from imposing a *per se* presumption of no prejudice, this Court reiterated *Strickland's* point that "the reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice." *Id.* at 390, *citing. Strickland*, 466 U.S. at 695-696, 700.

Petitioner cites two Missouri state death penalty cases in an effort to convince this Court that Missouri has, in the past, found no prejudice from the failure to use evidence of mental illness in mitigation of punishment. Petitioner misapplies both of these cases.

In *State v. Link*, 25 S.W.3d 136, 149 (Mo. banc 2000), the defendant alleged ineffective assistance of counsel for not contacting a second mental health expert to evaluate the impact of sexual and physical abuse defendant had suffered as a child. Defense counsel informed the trial court before the penalty phase began that he had made a conscious decision, based on his experience and training and the information he had been provided about the case, not to present any psychological experts in the penalty phase. *Id.* Counsel testified at the postconviction hearing that he was aware that the testimony of his experts and of the state's experts would show that the defendant had no mental disease or defect, that the defendant was anti-social and had a fixation on having sex with young

girls, and that the defendant would repeat his criminal behavior and would kill again. *Id.* Consequently, counsel made a trial strategy decision to keep out evidence about his client's life and to not pursue or introduce psychological evidence from any source. *Id.* The Missouri Supreme Court found that presenting additional psychological evidence would have led to the state introducing devastating testimony about the defendant's state of mind and would have verified other expert opinions that the defendant was anti-social, aggressive, and a serial rapist. *Id.* On the record presented in *Link,* the Court found no reasonable probability that the jury would have come to a different result on the issue of sentencing. *Id.*

Similarly, in *State v. Kenley,* 952 S.W.2d 250, 266-269 (Mo. banc 1997), trial defense counsel testified at the postconviction hearing that she and her co-counsel consciously decided, after discussion, not to seek additional psychiatric evaluations of their client. The Missouri Supreme Court found that defense counsel made the decision not to pursue a certain line of investigation that possibly could have further damaged their client's case. *Id.* at 268. The Court noted that counsel is not obligated to shop for an expert witness who might provide more favorable testimony, and that counsel did present evidence in mitigation. *Id.* at 268-269. The Court found no reasonable probability, under the totality of the case, that the jury would have given a different sentence if additional mitigating evidence had been presented. *Id.* at 268.

Link and *Kenley* differ significantly from this case. In both cases, trial counsel investigated whether mitigation evidence existed and determined whether additional investigation was warranted. *Link*, 25 S.W.3d at 149; *Kenley*, 952 S.W.2d at 266-269. Counsel in both cases considered the impact of the possible mitigation evidence already available and made a conscious decision that additional evaluations and investigations could be detrimental. *Link*, 25 S.W.3d at 149; *Kenley*, 952 S.W.2d at 266-269. The Missouri Supreme Court in both cases examined the performance of trial counsel and reached the conclusion that additional mitigating evidence would not have made a difference in the result of the sentencing proceedings. *Link*, 25 S.W.3d at 149; *Kenley*, 952 S.W.2d at 266-269.

The Missouri Supreme Court found a very different situation in Mr. Vaca's case, focusing, as *Strickland* dictates, on the particular facts and circumstances of Mr. Vaca's trial. 466 U.S. at 695-696. Mr. Vaca's attorney had gathered information that could be used as mitigation in a bifurcated sentencing proceeding, but counsel did not even consider using that information in the sentencing phase of trial. Mr. Vaca's attorney did not consider the impact of the possible mitigation evidence he already had, and made no determination about whether additional investigation was necessary. Mr. Vaca's attorney never even approached the point of having to decide whether the benefits of the possible mitigation evidence were

outweighed by any detrimental impact it might have on the jury, because he did not analyze that evidence "from that perspective."

Other cases cited in the state's Petition address strategic decisions by counsel to forego certain mitigation evidence. In *Barnes v. Thompson*, 58 F.3d 971, 980-981 (4th Cir. 1995), trial counsel made a tactical decision to limit his investigation and to not present certain mitigating evidence because it would have been counterproductive to his trial strategy of preventing a finding of future dangerousness. In *Dowthitt v. Johnson*, 230 F.3d 733, 744-745 (5th Cir. 2000), counsel did not investigate a mental health mitigation case because his client "appeared sane and competent at all times." Additionally, counsel had obtained a psychiatric evaluation, but decided as a matter of trial strategy not to call the doctor because the doctor's position was not entirely favorable to the client and the doctor would have had to respond with more damaging information on cross-examination. 230 F.3d at 747-748. In *Willacy v. State*, 967 So.2d 131, 144 (Fla. 2007), trial counsel made a trial strategy decision to portray his client as a life worth saving, and therefore avoided putting on evidence that would have depicted him as a sociopath or psychopath and which would have opened the door to additional aggravating facts. In each of these three cases, the reviewing courts relied on the tactical decisions of trial counsel that the potential for opening the door to damaging evidence outweighed any benefit from the omitted mitigating evidence, and thus held in each case that there was no reasonable probability that

the sentencing outcome would have been different if the omitted evidence had been presented. *Barnes*, 58 F.3d at 980-981; *Dowthitt*, 230 F.3d at 745; *Willacy*, 967 So.2d at 144.

Unlike *Barnes*, *Dowthitt*, and *Willacy*, counsel in Mr. Vaca's case did not make a trial strategy decision about whether or not to call Dr. Geis to testify in the sentencing phase. Counsel did not even consider the possibility of presenting evidence to show that Mr. Vaca's actions were influenced by his long-standing mental illness, of which counsel was well-aware. Dr. Geis's testimony would not have been counterproductive to any other sentencing phase trial strategy, particularly because whatever strategy existed was very slim. The only witness called at sentencing was Mr. Vaca's father, who testified only that Mr. Vaca had no prior convictions and that he and his wife had not visited Mr. Vaca during the 45 months he was incarcerated pending trial. While it is possible that an attorney might be concerned that Mr. Vaca's mental illness would present a "double-edged sword" based on a general prejudice against evidence of mental illness, Mr. Vaca's attorney did not claim to have had that concern, nor did he omit the evidence on that basis. Notably, the evidence presented at the postconviction hearing raised no specter of opening the door to other, more damaging evidence, but simply portrayed a man with a long-standing mental illness who encountered problems with his insurance and medications, which caused him to briefly deviate from his generally peaceful and law-abiding norm.

Petitioner claims that in *King v. Kemna*, 266 F.3d 816, 825 (8th Cir. 2001), the reviewing court dismissed as "rank speculation" a claim that evidence of the defendant's diminished capacity might have persuaded the court to impose a more lenient sentence. Petition at 20. Petitioner fails to explain that in *King* 1) after two mental evaluations, there was no evidence that King had a mental health or diminished capacity defense, and 2) the trial court, in sentencing King, emphasized that he was imposing consecutive life terms because of King's criminal history, including serious violent offenses and the nature of the attack for which he was prosecuted. 266 F.3d at 824-825. The decision in *King* was based on the specific facts of that case, as required by *Strickland*, 466 U.S. at 690-691, 695-696.

Unlike *King*, Mr. Vaca's case presents a long, documented history of low intelligence and mental illness, going back to childhood, contrasted with a generally uneventful life with no history of serious violent offenses prior to the offenses charged. Mr. Vaca did not even have any prior misdemeanor or felony convictions. He had lived with his parents and siblings for his entire adult life and was on Social Security disability. A reasonable probability exists that a jury hearing about Mr. Vaca's mental health issues would not have imposed such harsh terms in prison, and the result of the sentencing hearing therefore would have been different.

In only two of the cases relied on by Petitioner, the courts analyzed the alleged mitigating evidence and found that it would have been detrimental to the defendant for counsel to have presented it at trial. In *Ransom v. Johnson,* 126 F.3d 716, 721-722 (5th Cir. 1997), the court came close to finding deficient performance on the part of counsel for failing to discover and present penalty phase evidence of the defendant's abusive upbringing, as detailed in his welfare file. The court stopped short of making such a finding, because the court found that the alleged mitigating evidence included information detrimental to the defendant which, when weighed against the evidence heard at the guilt phase, was not "of sufficient quality and force to raise a reasonable probability that, had it been presented to a jury, a life sentence would have resulted." *Ransom,* 126 F.3d at 724. In *Davis v. Executive Dir. Dept. of Corr.,* 100 F.3d 750, 760-761 (10th Cir. 1996), the alleged mitigating evidence was not strong, and all of the alleged mitigating evidence was tainted by the underlying danger that it would have revealed to the jury that the defendant had a history violence and abusive behavior that was fueled by alcohol.

Both of these cases are distinguishable from Mr. Vaca's case. Mr. Vaca's long history of mental illness dates back to his childhood. While there is some indication that Mr. Vaca may have engaged in isolated incidents of violence in the past, he had no prior misdemeanor or felony convictions of any sort and no significant history of violent behavior. Mr. Vaca had lived with family members

for his entire life and has no history of any drug or alcohol abuse. Dr. Geis did not find Mr. Vaca to be anti-social or to have a personality disorder. Dr. Geis was a sympathetic witness for Mr. Vaca and would have explained to the jury that Mr. Vaca's mental health deficits were a life-long, debilitating, naturally occurring phenomenon for which he conscientiously and repeatedly sought treatment. On balance, Dr. Geis's testimony would have been considerably more favorable than unfavorable to Mr. Vaca, and would have been of sufficient quality and force to raise a reasonable probability that it would have moved the jury to assess shorter sentences.

Similarly, the cases that do not apply a "double-edged sword" analysis do not advance Petitioner's claim. In *In re Washington,* 838 A.2d 87, 90-91 (Vt. 2003), the court found no reasonable probability that the evidence not presented would have changed the outcome of the sentencing proceeding, because the defendant would not cooperate with counsel's efforts to obtain a mental evaluation and refused to allow such evidence to be presented, based on an overriding scheme to prevent his brother from being convicted in a federal drug case. In *Robitaille v. State,* 971 So.2d 43, 70-71 (Ala. Crim. App. 2005), the defendant argued that his attorney did not present any meaningful evidence in mitigation, but the record did not show what mitigating evidence could have been presented. Finally, in *Gacy v. State,* 530 N.E.2d 1340, 1343-1345 (Ill. 1988), the record indicated to the appellate court that trial counsel made a strategic decision to rely on mitigating

evidence that had been admitted during the guilt phase, and to avoid arguing matters that were not helpful and which depicted the defendant as manipulative of others.

Here, Mr. Vaca cooperated with counsel's efforts to obtain a mental evaluation and the results of that evaluation supported using that evaluation as mitigating evidence. The record of Mr. Vaca's postconviction hearing establishes that Dr. Geis could have testified during the sentencing hearing, to a reasonable degree of psychological certainty, that at the time of the offenses Mr. Vaca had a serious mental disease, schizophrenia, paranoid type, which impacted his ability to form rational thought and to conform his behavior to the requirements of the law. Dr. Geis also could have testified that Mr. Vaca's borderline intellectual functioning affected his ability to understand the impact of his actions. Nothing in the record indicates any interference by Mr. Vaca with his attorney's ability to do his job. Mr. Vaca has established that there was substantial mitigating evidence available to counsel that would have helped to explain Mr. Vaca's behavior in committing the charged offenses.

Petitioner, as it did in the Missouri Supreme Court, seeks to mislead this Court by arguing that evidence of mental illness is such a dangerous "double-edged sword" as to be presumptively not prejudicial. The state is disingenuous in its claim that it seeks to prevent the creation of a new category of *per se* prejudice; instead, the state seeks to impose a presumption of no prejudice. Petitioner would

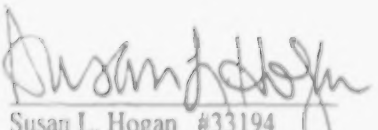
have this Court find that in any case where there are both "pros and cons" to presenting certain mitigating evidence, it is always reasonable for counsel to forego that evidence. This is an attempt by Petitioner to subvert the mitigating effect of evidence that the defendant has significantly impaired intellectual functioning, suffers from mental illness, or grew up in disadvantaged circumstances. *See, e.g., Rompilla v. Beard,* 545 U.S. 374, 390-391; *Wiggins v. Smith,* 539 U.S. 510, 535 (2003); *Tennard v. Dretke,* 542 U.S. 274, 288 (2004). The Missouri Supreme Court properly took evidence of Mr. Vaca's mental illness into account and properly applied *Strickland's* test for prejudice. This Court should reject Petitioner's attempt to impose a presumption of "no prejudice" by denying certiorari.

CONCLUSION

This Court should deny certiorari because the Missouri Supreme Court properly and straightforwardly applied the tests for both performance and prejudice, mandated by this Court in *Strickland v. Washington,* 466 U.S. 668 (1984), to the unique facts presented by Mr. Vaca's case. The Missouri Supreme Court did not create a new category of *per se* prejudice, nor did the Court lower the threshold for a finding of prejudice in a non-capital bifurcated trial. Additionally, certiorari should be denied because Petitioner seeks to impose a presumption of no prejudice in any case in which the omitted mitigating evidence

could be deemed to present both benefit and detriment for the defense. For all of the reasons stated herein, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,



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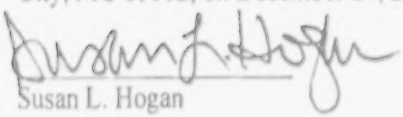
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid to Daniel N. McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102, on December 27, 2010.



Susan L. Hogan

APPENDIX

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Section 557.036, RSMO Supp. 2008

Role of court and Jury in sentencing – two stages of trial – punishment assessed by jury – when.

1. Upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. Where an offense is submitted to the jury, the trial shall proceed in two stages. At the first stage, the jury shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the jury at the first stage.

3. If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. The court shall instruct the jury as to the range of punishment authorized by statute for each submitted offense. The attorneys may argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The jury shall assess and declare the punishment as authorized by statute.

4. A second stage of the trial shall not proceed and the court, and not the jury, shall assess punishment if:

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt; or

(2) The state pleads and proves the defendant is a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender as defined in section 558.016, RSMo, a persistent sexual offender as defined in section 558.018, RSMo, or a predatory sexual offender as defined in section 558.018, RSMo.

If the jury cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If, after due deliberation by the jury, the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment that the court will assess punishment.

5. If the jury returns a verdict of guilty in the first stage and declares a term of imprisonment in the second stage, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense

6. If the defendant is found to be a prior offender, persistent offender, dangerous offender or persistent misdemeanor offender as defined in section 558.016, RSMo:

(1) If he has been found guilty of an offense, the court shall proceed as provided in section 558.016, RSMo; or

(2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for the class A felony.

7. The court shall not seek an advisory verdict from the jury in cases of prior offenders, persistent offenders, dangerous offenders, persistent sexual offenders or predatory sexual offenders; if an advisory verdict is rendered, the court shall not deem it advisory, but shall consider it as mere surplusage.

CREDIT(S)

(L.1977, S.B. No. 60, p. 662, § 1, eff. Jan. 1, 1979. Amended by L.1981, H.B. No. 554, p. 636, § 1; L.1990, H.B. No. 974, § A; L.1996, H.B. No. 974, § A; L.2003, S.B. No. 5, § A, eff. June 27, 2003.)